Chapter 3

ANTICIPATORY BAIL : A NECESSITY OR AN ANOMALY

Nature and Purpose

ONE OF the challenges that the law enforcement agencies are facing from the human rights movement is that nobody should be confined in any way, unless he is declared guilty. To meet such posers the bail mechanism in India has been statutorily extended by induction into its fold a comparatively new concept, commonly known as 'anticipatory bail'. Section 438 of the Criminal Procedure Code 1973 has been shaped to incorporate this concept. It deals with a situation where a person having reasonable apprehension that he would be arrested on an accusation of having committed a non-bailable offence seeks to prevent his detention. Such a person can move an application in an appropriate court, which may grant him an anticipatory bail.

Under the Code of Criminal Procedure, 1898, there was no provision corresponding to section 438 of the 1973 Code providing for bail in anticipation of arrest. Anticipatory bail was, however, granted in certain cases under the High Courts' inherent powers though the preponderant view negatived the existence of any such jurisdiction.[1] The Law Commission in its 41st Report, recommended the introduction of a provision in the Code enabling the High Court and the Court of Session to grant "anticipatory bail". The Commission viewed that "the necessity for granting anticipatory bail arises mainly because sometimes influential persons try to implicate their rivals in false cases for the purpose of disgracing them or for other purposes by getting them detained in jail for some days. In recent times, with the accentuation of political rivalry, this tendency is showing signs of steady increase. Apart from false cases, where there are reasonable grounds for holding that a person accused of an offence is not likely to abscond, or otherwise misuse his liberty while on bail, there seems no justification to require him first to submit to custody, remain in prison for some days and then apply for bail."[2]

The legislative history of the provision reveals that the Joint Select Committee of Parliament had initiated a thought that bail should be made available in anticipation of arrest so that liberty of an individual may not be unnecessarily jeopardised. The matter was referred to the Law Commission for consideration about the inclusion of the remedy of grant of anticipatory bail in the Code of Criminal Procedure, 1973. The Law Commission was enthused to take up the suggestion. It formulated a draft provision to

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1. *Mangilal v. State* 1952 Cr.LJ 1425 (MB); *State of Gujrat v. Govindlal Monilal Shah*, IR 1966 Guj. 146; contra. *State v. Kailash*, AIR 1953 All. 98; *State v. Omprakash*, 1973 Cr.LJ 824 (H&P).
2. Law Commission of India, *41st Report on the Code of Criminal Procedure*, Vol. I, p. 311 (1969).

provide bail in anticipation of an arrest which ultimately got enacted as section 438 of the code. The section reads as follows :

Section 438. *Direction for grant of bail to person apprehending arrest.*

(1) When any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section; and that Court may, if it thinks fit, direct that in the event of such arrest, he be released on bail.

(2) When the High Court or the Court of Session makes a direction under sub-section (1) it may include such conditions in such directions in the light of the facts of the particular case as it may think fit, including -

(i) a condition that the person shall make himself available for interrogation by a police officer as and when required;

(ii) a condition that the person shall not directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer;

(iii) a condition that the person shall not leave India without the previous permission of the Court;

(iv) such other condition as may be imposed under sub-section (3) of Section 437, as if the bail were granted under that section.

(3) If such person is thereafter arrested without warrant by an officer in charge of a police station on such accusation, and is prepared either at the time of arrest or at any time in the custody of such officer to give bail, he shall be released on bail; and if a magistrate taking cognizance of such offence decides that a warrant should be issued in the first instance against that person, he shall issue a bailable warrant in conformity with the direction of the court under sub-section (1).

The principle that was being implemented through the provision of anticipatory bail, according to one opinion, is alien to the concept and purpose of bail because enacting such a provision in the chapter on bail has produced difficulties. In fact, the Law Commission itself did not lay down in "the Statute certain conditions under which alone anticipatory bail could be granted." It said : "We found that it may not be practicable to exhaustively enumerate those conditions; and moreover, the laying down of such conditions may be considered as prejudging (partially at any rate) the whole case". The task was passed on by the Law Commission to the courts with the pious hope that the 'superior courts will, undoubtedly, exercise their discretion properly", in the wake of such matters as the Commission thought are being accentuated on account of political rivalries.[3] The Commission, in this respect, observed :

3. *Id.* para 39.9, pp. 320-21; see also the Law Commission of India, *48th Report*, para 31 (1972).

> In order to ensure that the provision is not put to abuse at the instance of unscrupulous petitioners, the final order should be made only after notice to the Public Prosecutor. The initial order should only be an interm one. Further, the relevant section should make it clear that the direction can be issued only for reasons to be recorded, and if the court is satisfied that such a direction is necessary in the interests of justice.[4]

Some argue that the Law Commission has perhaps based its recommendation on a wrong formulation that the anticipatory bail could be an answer to situations which correspond to tortious wrongs of malicious prosecution, abuse of legal process, false imprisonment and the like. The stunted growth of the law of torts in India having been unable to meet such mischievous situations did call for a remedial action particularly in the wake of accentuated political rivalry which has been "showing signs of steady increase."[5] Such wrongs are being perpetrated in the society, thereby putting an unnecessary strain on the machinery of criminal justice, besides abusing processes of criminal law. The remedy, according to them, does not appear to lie in the grant of bail, anticipatory or otherwise. They claim that bail is not a remedial measure. It is an in-built mechanism of the administration of criminal justice. Its basic purpose is to settle a custodial arrangement between the concerned parties viz., the court and the police on the one hand and the accused on the other to ensure that the person is available to the agencies of criminal justice as and when his presence is required for purposes of fulfilling the obligations of criminal law and justice.

Judicial Approach

A judicial approach to the exercise of discretion has been a cautious one. It does not and perhaps cannot, exercise the power on the assumption that a frivolous accusation may be at the back of a proposed or initiated criminal proceeding. The nature of accusation is likely to determine the attitude of the court in this regard. The discretionary power is to be exercised only after a notice to the public prosecutor is given and necessary reasons are recorded if the court considers granting of bail is necessary in the interests of justice.

The Patna High Court ruled that the provision be used in cases where "the court is convinced that the person is of such a status that he would not abscond or otherwise misuse his liberty".[6] The court further said that even before this provision was introduced, there had been a practice in vogue which enabled a court to release on bail such persons without a

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4. *Ibid.*
5. *Ibid.*
6. *Narsingh Lal Daga v. State*, 1977 Cr.LJ 1776 (Pat.).

surety or on their having given a personal undertaking that they would appear before the court if required to do so.[7]

The above view is in consonance with the general judicial attitude of taking a restrictive view of the personal liberty aspect of the matter. Personal liberty is to be enjoyed by all and in an equal measure. It has no relation with the status of a person as such, which the society so often measures only in terms of his material wealth and power. The Law Commission's criterion has been that the justification for denying personal liberty to a person ought to lie on the apprehension of his absconding or misusing his liberty but this approach has explicitly been qualified by the Patna High Court when it observed :

> Ordinarily, there should be a presumption in favour of every citizen that he is not likely to abscond or otherwise misuse his liberty while on bail. But such presumptions are generally belied and one cannot be granted bail on that account.[8]

The foregoing observations of the court need to be viewed a fresh in the light of the views of the Law Commission, which recommended the use of such a mechanism as a measure to promote interests of personal liberty, and the wisdom of the legislators who formulated, debated and passed the Bill. It is, however, not suggested that denial of this relief to the petitioner involved in the breach of law committed under section 7 of the Essential Commodities Act, 1955, and rule 194 of the Defence of India and Internal Security of India Rules, 1971, had been incorrect.[9] What is being said has incidentally put a dent in the basic concept of bail as the facility of anticipatory bail being made available to economic offenders.[10] The judicial efforts have thus extended the scope of this facility to a class of persons which were not within the purview of the Law Commission's proposal. The Commission sought to restrict the use of anticipatory bail to frivolous cases arising out of political rivalaries.

In an application for grant of anticipatory bail before the Punjab and Haryana High Court,[11] two influential parties were pitched against each other, to make the contest "unnecessarily prestigious". The court was required to intervene in the matter by way of granting bail to the members of one party who feared arrest on the basis of a first information report which showed that two shots were fired in the air by some unknown persons in a meeting of a registered society. No person was found hurt as a result of the

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7. *Id.* at 1777.
8. *Ibid.*
9. *Balchand Jain v. State of M.P.*, 1977 Cr.LJ 225, 227, 229, 232-38 (SC).
10. *Joseph v. Asstt. Collector of Customs, 1982 Cr.LJ* 559, 564 (Mad.); *Suresh Vasudeva v. State*, 1978 Cr.LJ. 677, 682 (Del.)
11. *Narinder Singh v. State*, 1977 Cr.LJ 596 (P&H).

reported shooting incident and even three weeks of police investigation could also not reveal as to who fired these shots. In such circumstances, the court issued direction for anticipatory bail.

In *Badri Prasad Pathya v. State*[12] the Madhya Pradesh High Court has, however, endorsed the view that grant of anticipatory bail is mainly meant to relieve a person from being unnecessarily deprived of liberty; though in the instant case the consideration of high hazards of releasing the persons alleged to be involved in a *prima facie* case of murder weighed with the court in rejecting the application as against their claims for personal liberty.

The purpose underlying section 438 of the code is to ensure that a person anticipating arrest is not obliged to go to jail till he is able to move the court for being released on bail. But it cannot also be construed that such a direction should be allowed to come in the way of police investigations nor should it seek to circumscribe police powers relating to remand to police custody for purposes of facilitating investigation. Accordingly, in *Samabhai v. State of Gujarat*,[13] the court observed that a direction for anticipatory bail would not be allowed to come in the way of a fuller consideration of the question of custody of the person when the investigations are incomplete. The court further said:

> The order may, therefore, provide that it will exhaust itself on or will remain operative only till the expiry of ten days from the date of the arrest and the accused will have to obtain a fresh order in usual course.... To avoid complications, instead of unlimited duration the order may provide that it will become inoperative if no arrest is made say within 90 days of the order.[14]

A search for factors guiding the issue of directions for anticipatory bail is continuous. Some conditions are already incorporated in clause (2) of section 438 of the Code of Criminal Procedure, 1973. In applying these conditions to specific situations the court may find it convenient to take into consideration factors like, gravity of the offence, nature of the accusation, character and antecedents of the petitioner as well as some such other cliches as are generally found in the judicial store-house and are so often relied upon. It may be said that search for guidelines may oblige the court even to fall back upon considerations indicated under section 437 of the Code, which provide for grant of bail in non-bailable cases, although proceedings under section 438 for the direction of anticipatory bail are to be invoked during the pendency of investigation and not after it.

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12. 1977 Cr.LJ (NOC) 130 (M.P.).
13. 1977 Cr.LJ 1524 (Guj.).
14. *Ibid.*

But the question when raised before the Karnataka High Court in *I.Y. Chanda Earappa v. State of Karnataka*[15] in terms that whether the limitation of court's power not to grant bail to certain categories of accused under section 437 would be applicable to its jurisdiction under section 438, the court answering in the negative reasoned:

> The foundation of the belief spoken of in S. 437 (1) by reason of which the court cannot release the applicant on bail is, normally the credibility of allegations contained in the F.I.R. In the majority of cases falling under S.438, that data will be lacking for forming the requisite belief.[16]

In *Balchand v. State of M.P.*,[17] the Supreme Court noted :

> [T] he Legislature in enshrining the salutary provision in Section 438 of the Code, which applies only to non-bailable offences, was to see that the liberty of the subject is not put in jeopardy on frivolous grounds at the instance of unscrupulous or irresponsible persons or officers....[18]

At the same time, the court stressed that "this being an extraordinary power should be exercised sparingly and only in special cases". With a view to giving effect to the above, the court further said the rule of prudence requires that notice should be given to the other side before passing a final order of anticipatory bail, so that a wrong order of anticipatory bail is not obtained by a party by placing incorrect or misleading facts or suppressing material facts.[19]

Anticipatory bail cannot be invoked as a matter of right. It cannot be used to thwart investigation or to defeat an exercise of proper police powers needed for purposes of investigation. However, when police actions prejudicially tend to tilt the balance against a party whose personal liberty is likely to be jeopardised without fuller justification under the law, courts can exercise discretion to issue a direction of anticipatory bail. This facility remains confined to persons apprehending arrest during pendency of investigation of non-bailable offences.

The discretionary power under section 438 of the Code is, thus, not an exercise of independent jurisdiction, but is dependent on seriousness of

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15. 1989, Cr.L.J. 2405 (Kant.).
16. *Ibid*
17. 1977 Cr.LJ 225 (SC).
18. *Id.* at 234 (*per* Fazal Ali, J.)
19. *Ibid.*

the accusation. For grant of anticipatory bail, the court has to be guided by a large number of considerations, including those contained in section 437, which deals with the bail in non-bailable cases.[20] The court cannot show laxity in exercise of discretion for grant of bail in anticipation. It cannot be said to be the intention of the legislature that investigation and initiation of criminal proceedings against a person should be hustled and an escape route be provided for persons alleged to have committed grave and heinous crimes by securing an easy bail at a stage not yet been reopened for pre-trial police action under the code.

In *Samunder Singh* v. *State of Rajasthan*,[21] the Supreme Court while commenting upon the grant of anticipatory bail to an accused in a dowry case by the Rajasthan High Court did not approve the apathetic manner in which the courts grant anticipatory bail in cases involving dowry deaths. The court made it further clear in *State of M.P.* v. *Ramkrishan Balathia*[22] that grant of anticipatory bail is not an essential ingredient of article 21, and its non-application to a certain special category of offences cannot be considered as violative of that article. Accordingly, the Gujarat High Court in *Khimiben* v. *State of Gujarat*,[23] deprecated the tendency of granting anticipatory bail to offenders involved in dowry death cases and ordered cancellation of anticipatory bail. The court was influenced by the Supreme Court ruling in *Samunder Singh*,[24] which stressed the need for caution in granting anticipatory bail to persons involved in dowry death cases. The Karnataka High Court in *State of Karnataka* v. *Narayanappa*,[25] however, refused to cancel anticipatory bail though it was granted on improper grounds, as there was no evidence of misusing the freedom by the accused.

There are instances of wider application of section 438 and extended exercise of jurisdiction by courts in the matters of anticipatory bail. Both procedural and jurisdictional matters, as have been reported, need to be taken seriously and a rethinking to be developed. The question whether section 12-AA of the Essential Commodities Act excludes sessions court's power to grant anticipatory bail came for consideration in *Kuppa Naidu* v. *State*,[26] wherein the Andhra Pradesh High Court held that the sessions court was not fettered from granting anticipatory bail under the

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20. *G. Muthuswamy v. State of Kerala*, 1980 Cr.LJ 1021, 1022 (Ker.) : *Balchand Jain, supra* note 17, but also see *Gurbaksh v. State of Punjab*, 1980 Cr.LJ 1125 (SC), *Narsimha Rao* v. *State*, 1997 Cr. LJ 961.
21. 1987 Cr. LJ 705 (SC)
22. 1995 Cr. LJ 2076 (SC)
23. 1992 CR.LJ 1994
24. *Supra* note 21
25. 1992 Cr.LJ 225
26. 1986 Cr.LJ 561

Essential Commodities Act. It reasoned :

> It is quite apparent from S.12-AA that it does not postulate anticipatory bail at all to be granted and, therefore, the exclusion of the powers conferred under S.438 Cr. P.C. by the special provision under the Essential Commodities Act, does not arise. Sec. 12-AA provides for release of persons after being apprehended of arrest. An analogous provision is enacted under S.437 of the Cr. P.C. Therefore, it is quite manifest that the principle of *Generalia specialibus non derogant* has no application in this case, in as much as, there is no express provision under the Essential Commodities Act to grant anticipatory bail.[27]

The Karnataka High Court delivered two decisions on grant of anticipatory bail which appear to be mutually contradictory. In *Shankar Nayak* v. *State of Karnataka*,[28] the persons who were apprehending arrest by forest officials, were denied anticipatory bail on the ground that anticipatory bail was available against apprehension of arrest by police officers and since forest officers are not police officials anticipatory bail cannot be granted to such persons. In *Gaffarsab* v. *State of Karnataka*,[29] the court granted anticipatory bail to persons apprehending arrest by forest officials on the ground that section 104-D of Karnataka Forest Act, 1964 prohibited release of persons only if they were in custody and since these persons accused of minor offences were not in custody, they could be granted anticipatory bail. It is of interest to note that these conflicting decisions came to be rendered by the same judge in the same year.

Healthy precedent is also available which shows that the courts have not allowed the practice of anticipatory bail to undermine the process of justice. In a spouse murder case, viz., *Chain Singh Dhakad* v. *Hargovind*,[30] the sessions court granted anticipatory bail on the ground that there was no sufficient material to charge the accused under section 306 IPC. The complainant approached the High Court and contended that the other side engaged prosecutor's son as their advocate and this had influenced the decision. The Madhya Pradesh High Court found that there existed material to frame charge under section 304 and keeping in view the Supreme Court ruling in *Samunder Singh's* case,[31] cancelled the anticipatory bail granted to the accused.

The Orissa High Court in *Mohamed Muzafar Hossain Khan* v. *State of Orissa*,[32] had to deal with the request for anticipatory bail by the petitioner, who was twice MLA and then a minister. He went to the polling

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27. *Id* at 563
28. 1991 Cr.LJ 1468 (Kant.)
29. 1991 Cr.LJ 2136 (Kant.)
30. 1991 Cr.LJ 33 (MP)
31. *Supra* note 21
32. 1990 Cr.LJ 1024 (Ori.)

station and on finding some disturbance, he was reported to have opened fire. His gunman, however, said that he had opened fire. The petitioner apprehended arrest under section 307 and sought for anticipatory bail. The court rejected his prayer saying that investigation should not be interfered with by grant of anticipatory bail.

The Karnataka High Court in *Shekhar* v. *State of Karnataka*[33] refused anticipatory bail to the accused who were police officers involved in a lock-up death case on the ground that it may be possible for them to influence investigation to their advantage. Also in *Baldev* v. *State*[34] and *Harshad Mehta* v. *Union of India*,[35] no anticipatory bail was granted as it would have affected investigation. In *Ambala Punamchand Rashmwala* v. *State*[36], anticipatory bail was refused as non-bailable warrants had already been issued by the concerned court.

The impropriety of the judicial officers in dealing with bail applications was criticised by the Madras High Court in *NKSM Hameed* v. *Mohamed Ibrahim*[37]. In this case the accused was granted anticipatory bail even after arrest and submission of an application for bail. The court observed :

> The grant of anticipatory bail, in such circumstances, would lend a helping hand to the persons accused during the course of trial to create a cloud of suspicion about their arrest, confession, consequent discovery of incriminating facts under section 27 of Evidence Act, etc, and derive maximum benefit out of it.[38]

Bail and anticipatory bail granted in serveral cases has, therefore, come to be cancelled for various reasons.[39]

However, direction not to arrest during the pendency of application under section 438 cannot be given.[40]

Grant of bail is improper where evidence is available pointing out the accused's participation in crime.[41] However, where the accused was not attributed with a positive role in a case of hunting black bucks under the

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33. 1991 Cr.LJ 1100
34. 1992 Cr.LJ 1604
35. 1992 Cr.LJ 4032.
36. 1992 Cr.LJ 2373
37. 1992 Cr.LJ 227
38. *Id.* at 230
39. See *State of Orissa v. Rajendra Prasad* (1994) SCC 146; *State v. Mathivanan*, 1994 Cr.LJ 2795 (Mad.); *State v. Nitin Shah*, 1994 Cr.LJ 2264 (Del.)
40. *Madam Mohan Sahoo v. State of Orissa* (1995) 9 OCR 553; *State of Haryana v. Bajanlal, 1992 Cr.LJ* 527; *Janta Dal v. M.S. Chowdhary*, 1993 Cr.LJ 600; *Mirza Yakub Baig v. State of Orissa*, 1999 Cr.LJ 1502.
41. See also *C. Abdul Hameed v. State of Karnataka* 1999 Cr.LJ 3654; *Jitendra Singh v. State of Rajasthan* 1999 Cr.LJ 158 (Raj.).

Wild Life Protection Act, he was granted bail by the court observing that the positive act of wielding gun and firing shots was done only by the main accused.[42] Moreover, pre-arrest bail cannot be denied on the plea of better qualitative elucidation of custodial interrogation unless there is apprehension of accused tampering with the investigation.[43]

For the grant of anticipatory bail, the accused must himself be the petitioner. The Gauhati High Court rejected the application for anticipatory bail on the ground that it was filed by the brother of the accused.[44] The person on anticipatory bail is for all practical purposes deemed to be in the custody of the court.[45]

Whether a complainant could be heard in a case for anticipatory bail under section 438 was answered by the Delhi High Court in the negative in *Smt. Indu Bala* v. *State of Delhi.*[46] The Court explained "that the object of the complainant would not be to see only that justice is done in a particular case but in all probability such a complainant would be swayed with the emotions to seek revenge or vendetta for his own satisfaction. Counsel representing the complainant cannot be as unbiased as a public prosecutor would be."[47]

In *Padmacharan Panda* v. *Ram Mohan Rao,*[48] the Orissa High Court ruled that an accused can be granted anticipatory bail at the stage before the case is committed to the sessions court. At the first instance, the police after investigation dropped the complaint. Later, on the basis of a protest petition an inquiry was conducted and the offences under sections 149, 324, 337 and 296 IPC as well as under sections 3 and 4 of the Explosives Act 1884, were taken cognizance of by the court. Summons were issued and after granting bail the case proceeded. At that stage the accused prayed for anticipatory bail and the sessions court granted the same. The opposite party moved the High Court to get this order cancelled. The court ruled that the order in the circumstances of the case was valid.[49]

The question whether the high court could grant anticipatory bail after the trial court has taken cognizance of the offence and issued process was dealt with in *Shaik Khasim* v. *State*[50]. The Andhra Pradesh High Court categorically ruled after examining the precedents that "the filing of a charge sheet by the police and issuing of a warrant by the magistrate did not end

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42. *Satish Ravilal Shah v. State of Rajasthan* 1999 Cr.LJ 727.
43. *State of Gujrat v. Dipak Jasvantlal Sheth* 1999 Cr.LJ 162.
44. *Pandrb Das v. State of Tripura*, 1999 Cr.LJ 1285 (Gau.).
45. *Vinod Kumar v. State of MP*, 1999 Cr.LJ 4364.
46. 1991 Cr.LJ 1774 (Del)
47. *Ibid.*
48. 1987 Cr.LJ 923.
49. See also *Sheikh Khasim v. State*, 1986 Cr.LJ 1303 (AP)
50. *Ibid.*

the power to grant bail under section 438(1)".

The power of the sessions court and the high court to grant anticipatory bail has been brought out in *Devidas Raghu Naik* v. *State*[51] by the Bombay High Court. In this case the appellant's prayer for anticipatory bail was rejected by the sessions court. He, therefore, approached the High Court with the same prayer on the same grounds. The court granted him anticipatory bail clarifying, that there is no bar whatever for a party to approach either the high court or the sessions court as concurrent jurisdiction is given to the high court and the sessions court and the fact that the sessions court has refused a bail does not operate as a bar for the high court entertaining a similar application.[52]

A recent judgement in *Smt. Gatubai v. State of Rajasthan*[53] is to the effect that the grant of bail in anticipation of arrest in non-bailable cases does not mean that the regular court which is to try the offender, is to be bypassed. The anticipatory bail should be of limited duration only and on the expiry of that duration the court granting anticipatory bail should leave it to the regular court to deal with the matter on an appreciation of evidence after investigation or submission of the chargesheet. Further, *C.H. Siva Prasad v. State of A.P.*[54] makes it clear that the operation of order under section 438 can be limited in time though the power of the High Court or the sessions court is not so limited. Where anticipatory bail is granted to the accused, normally some further time should be given to him to move to the higher court in case his application for regular bail is rejected by the first court.[55] For entitlement of anticipatory bail there must exist reasonable apprehension or belief of arrest and not mere suspicion, gossip or wild rumour. The apprehension must be capable of being examined objectively. Given this situation the jurisdiction can be invoked even in the absence of registration of the crime.[56]

Both the High Court and the sessions court have *concurrent jurisdiction* to grant anticipatory bail under section 438. An impression that the accused should first apply to the sessions court has been disapproved by the Andhra Pradesh High Court.[57] The Patna High Court has also ruled that anticipatory bail can be granted by a special judge appointed to deal

51. 1989 Cr.LJ 252 (Bom.)
52. *Ibid.*
53. 1999 Cr.LJ 1741; see also *Salahuddin Abdul Samad Shaikh v. State of Maharashtra*, 1996 Cr.LJ 1368; *K.L. Verma v. State*, 1996(7) SCALE (SP) 20.
54. 1999 Cr.LJ 1263
55. *Supra* note 45.
56. *K. Rajasekhara Reddy v. State of A.P.*, 1999 Cr.LJ 1933.
57. *Y. Chandrasekhara Rao v. Y.V. Kamala Kumari*, 1993 Cr.LJ 3508 (AP).

with cases under the Prevention of Corruption Act.[58]

The question whether a High Court can grant anticipatory bail in respect of an offence committed outside its territorial jurisdiction has been answered differently by different high courts. The M.P. High Court after a survey of decisions agreed[59] with the Punjab and Haryana High Court and Jammu and Kashmir High Court in *Ravinder Mohan* v. *State of Punjab*[60] and *Mohan Singh* v. *Commander of Police*[61] respectively which have replied it negatively. The Court pointed out that combined reading of section 438 and chapter XIII of the Code indicate that jurisdiction to try the accused for an alleged offence has to be determined with reference to the area within which the offence is committed. An application for anticipatory bail can be entertained by the local court having jurisdiction to try the accused. Similarly, the question whether anticipatory bail can be granted by any high court or sessions court irrespective of the locale of the commission of the offence came up for decision in *Syed Zaful Hassan* v. *State*.[62] The Patna High Court after examining the scheme of the Code and the precedents concluded that the courts having territorial jurisdiction in respect of the offences should have power to grant anticipatory bail.

Various questions concerning grant of anticipatory bail have been raised time and again before the high courts in India. The citizens' urge for keeping the freedom from police interference in their affairs makes them to seek the help of sessions court and the high court for obtaining anticipatory bail. Two conflicting desisions on the question of grant of anticipatory bail are found in *Jodha Ram* v. *State of Rajasthan*[63] and *Harjit Singh* v. *Union of India*[64] from the Rajasthan High Court and the Punjab and Haryana High Court. The former opines that anticipatory bail can be granted by the high court/sessions court in whose jurisdiction the applicant apprehends arrest; the latter holds the view that the power to grant anticipatory bail vests only in the court of session or the high court having territorial jurisdiction over the place of commission of the offence of which the person is accused. It may be noted that the latter's decision seems to be in conformity with the intention of the legislature. But the reasoning of the former is commendable.

The question whether an accused can be given anticipatory bail on apprehension of arrest for an offence allegedly committed in Madhya Pradesh by the Kerala High Court has been answered in the negative in *T.*

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58. In the matter of reference made by Shri Ravinandhan Shahay, Sessions Judge, Patna, 1993 Cr.LJ 2436 (Pat.) (FB).
59. *Pradeep Kumar Soni v. State of M.P.*, 1990, Cr.LJ 2055 (MP)
60. 1984 Cr.LJ 714 (P&H).
61. 1983 Cr.LJ 1182 (J&K); see *also infra note 62.*
62. 1986 Cr.LJ 605 (FB).
63. 1994 Cr.LJ 1962 (Raj.)
64. 1994 Cr.LJ 3134 (P&H).

Madhusoodanan v. *Superintendent of Police*.[65] The court has followed the same view in *C.T. Mathur* v. *Govt. of India, Home Department (CIB)*.[66]

Judicial convenience demands that it is the court which is *in seisin* of the original case has jurisdiction to grant anticipatory bail. Following this principle the petitioner in *Salauddin Abdul Samad Shaikh* v. *State of Maharashtra*[67] was ordered by the Bombay High Court to approach the appropriate court which was *in seisin* of the case. On challenging this order, the Supreme Court responded :

> It should be realised that an order of anticipatory bail could even be obtained in cases of a serious nature as for example murder and, therefore, it is essential that the duration of that order should be limited and ordinarily the court granting anticipatory bail should not substitute itslef for the original court which is expected to deal with the offence. It is that court which has then to consider whether, having regard to the material placed before it, the accused person is entitled to bail.[68]

Suspension of Section 438

The provisions enabling sessions courts and high courts to grant anticipatory bail to avoid harassment of individuals are sometimes suspended to suit the needs of the system for ensuring prompt investigation. In the State of Uttar Pradesh section 438 providing for anticipatory bail was repealed by the Act no. 16 of 1976. But the decision in *Dr. Vinod Kumar v. State of U.P.*[69] indicates that how intolerant it is for the general public if an existing provision is withdrawn or suspended. The petitioners try their best either to restore it or to find new ways to achieve the same results. In this case, in a situation where the provision for granting anticipatory bail was withdrawn in Uttar Pradesh the petitioner argued that the magistrate is required to dispose of the requests for bail on the day of the arrest itself. The full bench after examining the various provisions in the Code, concluded that if there is adequate material available the magistrate can decide that bail application always. But the jurisdiction is exclusively of the magistrate and it can neither be imposed nor curtailed by the high court, other wise it will amount to infringement or interference with the authorities exclusively vested with the magistrate/sessions judge.

The agony of the persons accused of offences, like those under Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, for which anticipatory bail is not applicable is evident from cases like

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65. 1992 Cr.LJ 3472.
66. 1992 Cr.LJ 1316.
67. 1996 SCC (Cri.) 198.
68. *Id.* at 199
69. 1996 Cr.LJ 307.

Girdharilal v. *State of Rajasthan*,[70] wherein the court felt constrained to comment :

> It is the duty of this court to see that the stringent provisions of Section 18 of the Scheduled Castes/Scheduled Tribes (Prevention of Atrocities) Act, 1989 are not misused. The aforesaid object can be achieved only if judicial scrutiny is made permissible to find out whether an offence under the aforesaid Act has been committed by a person or a group of persons before refusing him or them, as the case may be, the benefit of pre-arrest bail.[71]

The Bar, in this case, impressed upon the court to place on record their anxiety on which the court noted :

> "After dictation of the order the learned members of the Bar present in the Court made a request to make the order reportable. The request is allowed and the order is made reportable."[72]

The Rajasthan High Court has, however, held that anticipatory bail being a creature of statute could be done away with by a statute of the Parliament and hence section 18 of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 which declared section 438 not applicable to cases coming under it, was held valid.[73]

The Allahabad High Court's ruling to the effect that arrests could be stayed and interim bail for short periods could be granted, can be explained in the light of this position. The repealing of this provision coupled with delay in the disposal of application for ordinary bail has made the court to devise new modes of affording protection of liberty of the accused.

The rationale in *Issma* v. *State of U.P.*[74] is characteristic of the reasoning resorted to by the courts prior to the enactment of section 438. The court observed :

> Since the Courts of Magistrates and the Courts of Sessions have jurisdiction to grant the ultimate relief of bail, they also have jurisdiction to grant limited relief short of grant of bail in suitable cases by way of releasing an accused on personal bond for a short period as an ancillary or incidential relief. As soon as an accused surrenders before a court he submits to the jurisdiction of the court and the right of the police to arrest him does not exist thereafter. When an accused surrenders and is released on personal bond, he remains in the custody of the court. Release on pesonal bond is

70. 1996 Cr.LJ 1613
71. *Id.* at 1614.
72. *Id.* at 1615.
73. *Ibid.*
74. 1993 Cr.LJ 2432 (All.)

> nothing but a release on temporary bail, pending the final disposal of the bail application in order to make the remedy effective and efficacious.[75]

In *Haji Peer Mahamed* v. *State of U.P.*,[76] the court has identified cases where interim bail could be granted. It located the power to grant interim bail in sections 437 and 439. The court supporting its claim observed :

> "The perennial stream of writ petitions filed in this court securing the directions, for early disposal of the bail applications lend countenance to the grievance made by the learned counsel for the petitioners. The right to speedy trial which includes the right to speedy disposal of the bail matter has been held to be a part of the right of personal liberty under Art. 21 of the Constitution. Unfortunately we have noticed that the bail applications are not being expeditiously disposed of by the courts below and remain pending for a long time."[77]

A Critique

The facility of anticipatory bail has won a fair legitimacy in the criminal justice system and protection of personal liberty, but it is not taken gladly by all. According to the contrary opinions, as pointed out earlier, the inclusion of a provision for anticipatory bail in chapter XXXIII of the Code is bound to create confusion in the concept of bail, as well as in the application of principles of bail. It would perhaps be desirable and appropriate to insert such a provision elsewhere. It would even have been dealt with separately to meet the type of situations referred to under that provision, because the provision caters to an entirely different class of persons not termed as accused and are not under arrest.

The system of bail is improvised to curtail, control and abridge the dominion of authority over an apprehended accused. The mechanism of bail presupposes that the person seeking bail is an accused who already has been apprehended by police for keeping him in custody to make him appear before the court at the required time. Once the accused is brought before the court, police has to obtain its orders for custody of the arrested person. Custody of the accused person can be given either to the state or to the community. In the first situation, the accused is remanded to police or to judicial custody as the case may be. Alternatively, he may be released on bail at his request upon his executing a bond or may be given in the charge of a third party coming forward as a surety and furnishing a bail bond. In

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75. *Id.* at 2434
76. 1993 Cr.LJ 3574 (All.)
77. *Id.* at 3575.

latter situations the custody of the accused is deemed to have been given to the self of the accused or to the community. Unlike an accused who is seeking bail, a person by moving the court for anticipatory bail may not be present before the court. He can ask for bail even *in absentia*[78] because of a likely apprehension of his arrest. Thus , the constituents of bail are completely absent in the case of 'anticipatory bail. Hence custody of a person seeking bail cannot be had either with the state or the community, which makes the purpose of bail redundant.

The mechanism of bail has been contrived to meet problems of an apprehended accused, in whose case his interim release is to be secured with an assurance. The assurance has to be that his presence on an appointed day before the court will be available, so that the court may discharge its obligation of accomplishing the task to try the accused which is incumbent upon it as the judicial process. Nothing of the above kind exists when proceedings for anticipatory bail are invoked.

The use of bail mechanism for the purpose intended to be covered by the term anticipatory bail tantamounts to misuse of the machinery of criminal justice. In fact, the misuse of bail mechanism is a contraption to cover entirely different situations unrelated to those arising out of the law of arrest, investigation and trial in a criminal case. Its misuse is bound to affect the smooth working of the system. The immediate effects are discernible, firstly that the time of a criminal court is exhausted to consider matters which are yet to crytallise into mature criminal actions. Secondly, by taking cognizance of such matters and bringing them within the court's criminal jurisdiction, the authority of the investigating agency is likely to be hampered, because the probable accused manages to secure a protective shield in the anticipation of his arrest. This paves the way for interference by the court in the statutory jurisdiction of the police. The police has statutory power to investigate into a cognizable offence without requiring any instructions from a juducial authority. The anticipatory bail has a propensity to interfere with police power and authority. It even threatens to dismantle the utility of the well established rule laid down by the Privy Council in *King Emperor v. Khwaza Nazir Ahmad*[79] :

> Just as it is essential that every one accused of a crime should have free access to a court of justice so that he may be duly acquitted if found not guilty of the offence with which he is charged, so it is of the utmost importance that the judiciary should not interfere with the police in matters which are within their province and into which the law imposes on them the duty to inquire.[80]

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78. See R.L. Anand (ed.) Aiyer & Mitter, *Law of Bails*, 79-81, (1963) 4th ed.
79. L.R. 71 IA. 203 (1943).
80. *Id.* at 204.

The Privy Council noted that in India there is a statutory right on the part of the police to investigate the circumstances of an alleged cognizable crime without requiring authority from judicial authorities and observed that, it would be an unfortunate result if it should be held possible to interfere with those statutory rights by an exercise of the inherent jurisdiction of the court. The functions of the judiciary and the police are complementary and the combination of individual liberty with a due observance of law and order is only to be obtained by leaving each to exercise its own function.[81]

Since the concept of anticipatory bail is intended to be a fallout of the value of personal liberty, an added consequence would be to push the co-equal value of security and stability to the sidelines. The provision is thus legal anomaly in relation to the estabilished legal concept of bail. It is a provision more readily available to the affluent but it is definitely prejudicial to the interests of the administration of the bail process in the administration of criminal justice system.[82]

In spite of the given reservations about the anticipatory bail, there exists another stream of thought, according to which it can be safely observed that the anticipatory bail mechanism is a necessity. Without it numberless persons may be made to suffer in custody just on account of some suspicion or a false charge. Also the experiences of courts in evolving useful precedent in matters of anticipatory bail must not be undervalued.

81. *Ibid.*

82. See further *154th Report of the Law Commission of India on CrPC* (1996).